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Supreme Court of the United States

OCTOBER TERM, 1961

No. 683

RAUL PINTO,

Petitioner,

against

STATES MARINE CORPORATION OF DELAWARE,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Reasons for Granting Rehearing and Issuing the Writ	4
1. Certain defects in the original petition have been corrected	4
2. There is a high concentration of maritime personal injury litigation in the Second Circuit	4
3. A pending case before this Court raises similar or related issues	4
4. The intra-circuit conflict within the Second Circuit Court of Appeals has become more pronounced	6
5. There is a clear conflict with decisions of other Circuit Courts	8
6. The opinion below conflicts with holdings of this Court	9
7. The opinion below is in conflict with the weight of authority	11
Conclusion	14
Certificate of Counsel	14

Cases Cited

Arena v. Luckenbach Steamship Co., 279 F. 2d 186	12
Blier v. United States Lines Company, 286 F. 2d 920	12
Calderola v. Cunard Steamship Company, 279 F. 2d 475	11, 12
Carabellese v. Naviera Aznar, S.A., 285 F. 2d 355	12, 13

PAGE

Cookingham v. United States, 184 F. 2d 213, cert. den. 340 U. S. 935, 71 S. Ct. 495 12

Cosmopolitan Shipping Co. v. McAllister, 337 U. S. 783 6

Dunbar v. Henry DuBois' Sons Co., 275 F. 2d 304, 306, cert. den. 364 U. S. 815 7

Fink v. Shepard Steamship Co., 337 U. S. 810 6

Grzybowski v. Arrow Barge Co., 283 F. 2d 481 13

Holley v. The Manfred Stanfield, 186 F. Supp. 212 13

Knox v. United States Lines Co., 294 F. 2d 354 13

Michalic v. Cleveland Tankers, Inc., 364 U. S. 325, 81 S. Ct. 6 ..... 10, 11

Mitchell v. Trawler Racer, Inc., 360 U. S. 539, 80 S. Ct. 926 ..... 5, 6, 9, 10, 11, 12

Morales v. City of Galveston, 364 U. S. 295, 275 F. 2d 191, 181 F. Supp. 202 ..... 5, 6

Morales v. City of Galveston, 368 U. S. 816 ..... 4, 5, 6

Palermo v. Luckenbach S.S. Co., 355 U. S. 20 11

Pickett v. Union Terminal Co., 313 U. S. 591, 314 U. S. 704, 315 U. S. 386, 394 5

Poignant v. United States, 225 F. 2d 595 12

Puerto Segura Cia Naviero, S.A. v. Petros Pitsillas, 279 F. 2d 599 ..... 12, 13

Schriber-Schroth Co. v. Cleveland Trust Co., 305 U. S. 573 4

Van Carpals v. The S.S. American Harvester, 297 F. 2d 9, 11 7

Weade v. Diehmann, Wright and Pugh, 337 U. S. 801 6

Statutes Cited

28 U. S. C. 1254(1) 1

28 U. S. C. 2101 1

Stern & Gressman, Supreme Court Practice (2nd Ed.), pages 354-355 ..... 4, 5

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of April 9, 1962, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed January 25, 1962 herein.

Opinions Below

The opinions of the Court of Appeals in the instant case had not been reported at the time of the filing of the original petition. They are now printed in full at 296 F. 2d 1-9.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and 2101.

Questions Presented

1. Are considerations of "duration of condition" and determination of "how long" before the accident a dangerous condition existed aboard a vessel, relevant criteria in determining liability under the doctrine of unseaworthiness.

2. Is a shipowner excused from liability under the absolute duty imposed by the doctrine of unseaworthiness because the dangerous condition which causes the accident is but a "momentary phase in the work" aboard the vessel.

Statement

The petitioner, Raul Pinto, an able bodied seaman, was directed to carry a heavy signal light down from the wheelhouse to the engine room of a vessel, with the aid of ordinary seaman Fantroy. While descending the ladder in the engine room, he fell, allegedly because of the presence of grease on one of the steps of the ladder.

Both he and Fantroy testified that they saw the grease there immediately after the fall. No testimony was presented as to how long before the accident the grease had been there. The Jones Act—negligence count alleged in the complaint was therefore withdrawn at trial.

Several ship's officers testified on respondent's behalf that they examined the area at varying times before and after the accident and saw no grease there.

At the trial below, it appeared that the essential issue for the jury to decide would be whom to believe: petitioner and Fantroy, or the ship's officers. However, the learned Trial Judge, Hon. Edward Weinfeld, U. S. D. J., in his charge stated:

> "* * * the mere momentary presence of oil in the area does not in and of itself render the vessel unseaworthy. Before you can find that the vessel

> was unseaworthy *plaintiff must satisfy you* by a fair preponderance of the evidence *that the alleged condition* of oil or grease, which he claims caused him to slip, *was not a momentary phase* in the normal progress of work in and about the engine room, but that oil and grease was permitted to accumulate in sufficient quantity so that the vessel was rendered unseaworthy. In other words, *it is not required that the vessel have a crew member handy with a rag to wipe off oil the very minute it is placed in an area.*" (Emphasis added.)

Plaintiff's counsel took exception to this charge on the specific grounds:

> "* * * that whether it was transitory or not wouldn't make any difference on a charge of unseaworthiness, and therefore, for the record we take an exception to that.
>
> We respectfully ask your Honor to charge that if the physical condition as it existed at that precise time was not reasonably safe for carrying down a particular blinker light, then they should not be concerned whether or not the condition was created just a few minutes before or a long time before. I don't think it makes any difference."

The jury returned a verdict for the respondent and the Trial Court entered judgment thereupon on March 15, 1960.

The Court of Appeals for the 2nd Circuit, affirmed the judgment of the District Court on October 26, 1961, in an opinion by Circuit Judge Friendly, joined in by Chief Judge Lumbard; Circuit Judge J. Joseph Smith dissenting. A petition for rehearing and rehearing *in banc* was decided on November 28, 1961, Circuit Judge Clark dissenting in an opinion joined in by Judge Smith.

Reasons for Granting Rehearing and Issuing the Writ

1. **Certain defects in the original petition have been corrected.**

This petition for rehearing is submitted on behalf of petitioner, Raul Pinto, alone. The prior petition, for which rehearing is here sought, was filed on behalf of four different petitioners (Docket No. 683). Counsel has now been advised that this procedure was improper.

This Court has several times stated that when the original petition was improperly prepared or defective, and such defect was cured in the subsequent petition for rehearing, the subsequent petition would be given full consideration on its merits. See cases cited by Stern and Gressman, *Supreme Court Practice* (2nd Ed.), pages 354-355.

2. **There is a high concentration of maritime personal injury litigation in the Second Circuit.**

In view of this high concentration of such litigation in the Courts of the Second Circuit, it is respectfully submitted that the instant petition for rehearing may and should be given special attention by this Court, even were there an absence of direct conflict of decision with the opinions of other Circuit Courts. (See *Schriber-Schroth Co. v. Cleveland Trust Co.*, 350 U. S. 573; where this Court granted certiorari on a petition for rehearing despite an apparent lack of conflict of decision "because of the concentration of the automobile industry in the Sixth Circuit.")

3. **A pending case before this Court raises similar or related issues.**

This Court recently granted certiorari for the second time in the case of *Morales v. City of Galveston*, 368 U. S.

816. The *Morales* case raises identical questions with the instant case with regard to maritime law and the doctrine of unseaworthiness.

Upon this Court's first review in *Morales* v. *City of Galveston*, 364 U. S. 295, remanding 275 F. 2d 491 and 181 F. Supp. 202, a judgment that unseaworthiness could not arise instantaneously from the overflow of contaminated grain was remanded *per curiam* by the Supreme Court "in light of Mitchell v. Trawler Racer, Inc., 360 U. S. 539."

Upon the above mentioned remand (291 F. 2d 97) the Fifth Circuit again declined to find that an unseaworthy condition existed subsequent to the instantaneous contamination there involved. The vigorous dissent of Judge Rives, on the remand, asserted that time could not be a factor in determining unseaworthiness (291 F. 2d at 98-99).

It is unmistakably clear that the same question as that in the *Morales* case, *i.e.*, whether or not time is a relevant factor in determining the existence of liabilty under unseaworthiness, is involved in the instant case. (Compare Circuit Judge Smith's dissent [296 F. 2d at 8] and the dissent of Circuit Judge Clark [296 F. 2d at 8-9] with Circuit Judge Friendly's opinion on behalf of himself and Chief Judge Lumbard, particularly at 296 F. 2d at 6 and 7, where Judge Friendly stated that considerations of "the duration of the condition" and "how long" the condition had pre-existed the accident were relevant factors in determining the issue of liability under unseaworthiness.)

This Court has held that a petition for rehearing will be granted where the same or a related issue has come before this Court in other cases still pending. *Pickett* v. *Union Terminal Co.*, 313 U. S. 591; 314 U. S. 704; 315 U. S. 386, 394; Stern and Gressman, *Supreme Court Practice* (2d Ed.), page 354.

If this Court should reverse the Fifth Circuit Court's determination in *Morales* v. *City of Galveston*, *supra*, and adopt, in any part, the views of Judge Rives in his dissent below, it is more than likely that such determination would directly affect the instant case. This Court has in the past set down different cases involving similar or related issues of law to be argued simultaneously. See *e.g. Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783; *Wade* v. *Dichmann, Wright, and Pugh*, 337 U. S. 801, and *Fink* v. *Shepard Steamship Co.*, 337 U. S. 810.

It is respectfully submitted that in light of the fact that the analogous case of *Morales* v. *City of Galveston*, *supra*, is pending before this Court at present, the petition for rehearing herein may either be granted for separate argument or for argument in conjunction with the *Morales* case, or may be held in abeyance for determination or remand in light of this Court's determination of *Morales*. This last procedure is precisely what this Court adopted on the first presentation of *Morales* (364 U. S. 295) when it remanded that case in light of its determination in *Mitchell* v. *Trawler Racer, Inc.*, *supra*.

4. The intra-circuit conflict within the Second Circuit Court of Appeals has become more pronounced.

[The determination hereinbelow carries within itself a showing of intra-circuit conflict.] Circuit Judge Clark's dissent from the denial of the petition for rehearing *in banc* on behalf of himself and Judge Smith, expressly stated that "we cannot be expected to go contrary to what we believe to be the clear mandate of the Supreme Court by reason of a panel precedent" (296 F. 2d at 9).

Judge Clark was thus stating for both himself and Judge Smith that they would not follow the reasoning or result reached in the decision written by Judge Friendly. Judge Clark has previously made clear in a

maritime personal injury action, "that in a proper case a panel of this Court may frankly state its disagreement with the decision of another panel and refuse to be bound thereby." *Dunbar v. Henry Dubois' Sons Co.*, 275 F. 2d 304, 306, certiorari denied 364 U. S. 815. Furthermore, Judge Clark's reference to the "really troublesome division of view" (296 F. 2d at 9) in the instant case suggests that while other Circuit Judges of the Second Circuit Court of Appeals were unwilling to join Judge Clark and Judge Smith in granting petitioner the extraordinary (in the Second Circuit) privilege of an *in banc* hearing, they did not all share the views expressed in Judge Friendly's majority opinion.

This intra-circuit conflict was further exposed by the subsequent opinion of the Second Circuit Court of Appeals in *Van Carpals v. The SS American Harvester*, 297 F. 2d 9, 11. There Judge Clark, writing for a unanimous panel, emphasized "the 'absolute' duty of the shipowner to furnish a seaworthy ship" and held that the shipowner's absolute duty could not be wiped out merely because there was no proof of the precise cause of the unseaworthy condition out of which the accident arose. A comparison of Judge Clark's language in *Van Carpals, supra*, with Judge Friendly's language in the instant case (296 F. 2d at 6 and 7) relating to opportunity and feasibility of correction of the dangerous condition as a relevant factor in determining liability under unseaworthiness, can only cause confusion for District Court Judges attempting to apply both Second Circuit Court authorities.

Judges Clark and Smith have served notice in their dissenting opinions (296 F. 2d at 8 and 9) that they will reverse any jury charge which is identical or similar to the charge that was given by Judge Weinfeld in the trial court herein. Judges Friendly and Lumbard have demonstrated

that they will reverse if any charge other than that given by Judge Weinfeld is given by a Trial Judge. Inasmuch as the various panels in the Second Circuit comprise but three judges, it is now uncertain as to the correctness of the wording of such a charge.

In such circumstances, and particularly in view of the congestion of maritime personal injury cases which are tried in the Eastern and Southern Districts of New York, even were there no conflict with decisions of other Circuit Courts, the instant case would cry out for the granting of certiorari.

5. There is a clear conflict with decisions of other Circuit Courts.

Circuit Judge Friendly's opinion herein specifically sets forth that there is a conflict of decision between the opinion in the instant case and language in two opinions of the Court of Appeals for the Fourth Circuit. Thus, Judge Friendly stated (296 F. 2d at 7, footnote 6):

> "The charge differed essentially from that disapproved in Grzybowski v. Arrow Barge Co., 4 Cir., 1960, 283 F. 2d 481, distinguished in Blier v. United States Lines Co., supra, 286 F. 2d at page 926, where the judge had instructed the jury to consider the absence of previous complaint by the plaintiff or request for corrective action by the ship; we agree with the decision on that basis, *although the opinion contains some language with which we do not.* Similarly the decision in Puerto Seguro Cia. Naviera, S. A. v. Pitsillos, 4 Cir., 1960, 279 F. 2d 599, is not opposed to our view of Mitchell, *although certain of the language is;* the Court of Appeals simply sustained a permissible finding of unseaworthiness by a judge as trier of the facts." (Emphasis added.)

6. The opinion below conflicts with holdings of this Court.

The petitioner's position on appeal below was that following *Mitchell* v. *Trawler Racer, Inc., supra.*, decided on May 16, 1960, two months after Judge Weinfeld's charge herein to the jury, time could not be an element in an action in unseaworthiness, and it was therefore error to charge the jury that the momentariness of the presence of grease might relieve the shipowner of liability.

The majority opinion on the original appeal held that it would be proper to charge that "a momentary condition would not impose liability automatically" (296 F. 2d at 7). With this petitioner fully agrees, because first the jury must find that the condition was one which rendered the vessel not reasonably safe. Judge Weinfeld, however, charged the jury below that:

> "Before you can find that the vessel was unseaworthy, plaintiff must satisfy you [ ] that the alleged condition [ ] was not a momentary phase in the normal progress of work. [ ] it is not required that the vessel have a crew member handy with a rag to wipe off oil the very minute it is placed in an area."

As Judge Smith stated in his dissenting opinion, (296 F. 2d at 8), such a charge absolves the shipowner because of the momentary nature of the condition, a consideration, it is submitted, fully ruled out by this Court in *Mitchell*.

In *Mitchell*, *supra*, after a full review of unseaworthiness cases decided over the past century and a half, this Court concluded "that liability for a temporary unseaworthy condition is (no) different from the liability that attached when the condition is permanent" (362 U. S. at 550).

In *Mitchell, supra,* this Court held the shipowner's liability for a transitory condition to be absolute, without regard for its opportunity to correct the condition, the shipowner's control over the conditions or equipment involved, the shipowner's knowledge or notice of the dangerous condition, or its exercise of reasonable care to correct the condition. Thus, this Court stated "that the (shipowner's) duty is (no) less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port, (and) that the duty is (no) less with respect to an unseaworthy condition which may be only temporary" (362 U. S. at 549).

This Court, in *Mitchell,* reversed the charge of an outstandingly able District Court Judge, who had stated to the jury that "as far as the owner-operator of the vessel goes, it is his job to see it does not stay there too long * * *" (362 U. S. at 540, footnote 2), and upheld the exception of Mitchell's trial counsel who had stated "if there is an unseaworthy condition, there is an absolute situation, there is no time required" (362 U. S. a 541, footnote 3).

Six months after deciding *Mitchell, supra,* this Court re-expressed the absolute nature of the liability of the shipowner under seaworthiness and stated that "no amount of due care or prudence excuses him, whether he knew *or could have known* of its deficiency at the outset or after use." *Michalic* v. *Cleveland Tankers, Inc.,* 364 U. S. 325, 81 S. Ct. 6, 9 (1960); (emphasis added).

Accordingly, it is respectfully submitted that not only is the majority opinion below in the instant case one which involves intra-circuit conflict within the Court of Appeals for the Second Circuit (see Point 4 hereinabove); and one which involves stated conflict of decision with other Circuit Courts, (see Point 5 hereinabove); but is also, upon the analysis hereinabove set forth, one in conflict with the

doctrine of maritime law enunciated by this Court's determination in *Mitchell* v. *Trawler*, *supra*, and *Michalic* v. *Cleveland Tankers, Inc.*, *supra*.

No citation of authority is necessary for the well settled proposition that this Court has always wielded a supervisory eye and arm with regard to seamen's personal injury actions, both under the Jones Act and under the general maritime law of unseaworthiness, and that when Courts stray from the application of principles enunciated by this Court, certiorari and reversal will be granted by this Court. It is respectfully submitted that the Circuit Court's failure to apply the principles enunciated by this Court in *Mitchell* and *Michalic* is so clear as to justify this Court's considering entering a reversal and remand summarily upon the papers on the instant petition for certiorari, as it did in *Palermo* v. *Luckenbach S.S. Co.*, 355 U. S. 20.

7. The opinion below is in conflict with the weight of authority.

The Second Circuit Court of Appeals applied *Mitchell*, *supra*, on May 31, 1960 in *Calderola* v. *Cunard Steamship Company*, 279 F. 2d 475. There, defendant submitted a request to charge uncannily similar to the one given herein by Judge Weinfeld.*

The Trial Judge rejected the request and defendant appealed. The Circuit Court held, pursuant to this Court's decision in *Mitchell*, *supra*, that the denial of defendant's request was proper, (279 F. 2d at 477).

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* "That the alleged condition of grease on which the plaintiff claims to have slipped was not a momentary phase in the progress of the work on board but existed for a period of time prior to the alleged accident (*Grillea* v. *United States*, *supra*, *Mitchell* v. *Trawler Racer*, C. C. A. 1, April 7, 1959 [27 U. S. Law Week 2520])"; Defendant's Request to Charge 2a, Record on Appeal, p. 159a, Appendix to Brief of Defendant-Appellant and Third Party Plaintiff-Appellee, Cunard Steamship Co., and Third Party Defendant-Appellant, John T. Clark & Son.

In *Carabellese* v. *Naviera Azuar, S.A.*, 285 F. 2d 355, 359 (1960), the Second Circuit Court of Appeals stated "*Mitchell* * * * settles that a vessel cannot avoid liability for unseaworthiness merely because the owner has had no opportunity to remedy the unsafe conditions."

In Poignant v. *United States*, 225 F. 2d 595 (1955), five years before *Mitchell*, the Second Circuit Court held that unseaworthiness liability could arise as to conditions occurring after the onset of the voyage. In a concurring opinion, Circuit Judge Frank spelled out liability for a transitory slippery substance, quoting from and adopting Judge Bigg's dissenting words in *Cookingham* v. *United States*, 184 F. 2d 213, 216 (3rd Cir., 1950), cert. den. 340 U. S. 935, 71 S. Ct. 495:

> "If the stairway was in a condition dangerous for the use for which it was intended, however, 'transitorily', it was unseaworthy. It remained so while the unsafe condition persisted. *The element of time which has intruded itself in this case in both the opinion of this court and that of the court below is irrelevant under the doctrine of the shipowner's absolute liability.*" (225 F. 2d at 603) (Emphasis added.)

That Judge Frank's concurring decision in *Poignant* was essentially adopted by this Court in *Mitchell* is clearly indicated in Mr. Justice Harlan's comments in his dissenting opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. at 570-573, and by Circuit Judge Medina's reference in *Blier* v. *United States Lines Company*, 286 F. 2d 920, at 924 (2d Cir. 1961).

None of the Circuit Court opinions citing *Mitchell* and discussing the issue here involved adopt the position that considerations of "how long" are admissible in an action on unseaworthiness. See *Arena* v. *Luckenbach Steamship Co.*, 279 F. 2d 186, 189 (1st Cir. 1960); *Calderola* v. *Cunard Steamship Co.*, 279 F. 2d 475, 477 (2nd Cir. 1960); *Puerto Segura Cia. Naviera, S.A.* v. *Petros Pitsillos*, 279 F. 2d 599,

600 (4th Cir. 1960); *Grzybowski* v. *Arrow Barge Co.*, 283 F. 2d 481, 485 (4th Cir. 1960); *Carabellese* v. *Naviera Aznar, S.A.*, 285 F. 2d 355, 359 (2nd Cir. 1960); *Knox* v. *United States Lines Co.*, 294 F. 2d 354, 358 (3rd Cir. 1961).

For an incisive District Court review of the issue, concluding that duration of condition cannot be a factor in an action on unseaworthiness, see Judge Hoffman's opinion in *Holley* v. *The Manfred Stansfield*, 186 F. Supp. 212, 215-216 (E. D. Va. 1960).

It is respectfully submitted that many opinions of Circuit Courts of Appeals, including several of the same Second Circuit are here involved. This Court's opinion in the *Mitchell* case has been erroneously applied and interpreted in the instant case. In addition the precursor opinion by Circuit Judge Frank in *Poignant* v. *United States*, *supra*, also directly contradicts the holding by Circuit Judge Friendly and Chief Judge Lumbard in the instant case, thus justifying review and reversal by this Court.

The majority opinion below is unmistakably an important and significant decision in the law relating to recovery for maritime personal injury, and will directly affect the conduct of this type of case within the Second Circuit and probably within other Circuits. It will thus be of significant and perhaps decisive effect in that class of litigation which makes up by far the largest group of actual trials held in the District Courts within the Second Circuit and perhaps within other circuits within the Federal system as well.

Circuit Judge Friendly's opinion herein asserts that it deals with questions left open by this Court's opinion in *Mitchell*. If this is so, it is of utmost importance that this Court grant review and set forth its own conclusions as to how these further questions should be decided. If, as petitioner here asserts, the opinion below is simply in direct

conflict with this Court's prior determinations, then for these reasons certiorari should be granted or reversal should be summarily entered.

CONCLUSION

In view of the basic nature of the issue here involved and its relationship to the whole scope of maritime liability, the vital effect of the decision herein on innumerable cases now actually pending in the District Courts, and the different position taken on this issue by other Circuit Courts, we respectfully request that a rehearing be granted in this matter, and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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THEODORE H. FRIEDMAN,
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Certificate of Counsel

I, JACOB RASSNER, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified and Rule 33 of the Rules of this Court.

JACOB RASSNER,
Attorney for Petitioner.